No. 83-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, ALEXANDER GRANT & COMPANY, SOCIETE COMMERCIALE DE REASSURANCE and SCOR REINSURANCE COMPANY,

Petitioners,

—v.—

JAMES W. SCHACHT, the Acting Director of Insurance of the State of Illinois and Liquidator of Reserve Insurance Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF PEAT, MARWICK, MITCHELL & CO. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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November 1, 1983

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The petitioners have consented to the filing of the brief *amicus curiae*. The respondent has declined to consent. This motion is timely since the petition was filed and served by mail on September 29, 1983.

The movant, like three of the petitioners is a firm engaged in the practice of the profession of accounting. It believes that the decision below radically misconstrued the provisions and intent

of the Racketeer Influenced and Corrupt Organization Act ("RICO") by applying it to the accounting firm petitioners and their reports. The *amicus*, itself a defendant in RICO-based private damage actions, has a direct and vital interest that the scope of the treble-damage remedy of the RICO statute be determined by the Court and believes that the brief *amicus curiae* will aid the Court in its review of the petition.

The movant respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

s/ VICTOR M. EARLE, III

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INTEREST OF THE *AMICUS CURIAE*

This brief in support of the petition for a writ of certiorari is submitted on behalf of Peat, Marwick, Mitchell & Co. as *amicus curiae*.

The *amicus curiae*, like three of the petitioners, is a firm engaged in the practice of the profession of accounting. It reports as an independent public accountant upon its examinations of the financial statements of governmental bodies and public and private enterprises.

It is not "employed by or associated with" its clients, but rather is engaged as a professional firm and its association is with the financial statements upon which it reports. It does not "acquire or maintain interests" in its clients—its profession's requirement of independence forbids any such relationship. It does not "conduct or participate in the conduct of the affairs" of its clients, rather it examines and reports upon the financial statements which reflect its clients' affairs.

An accounting firm simply does not engage in the activities prohibited by 18 U.S.C. § 1962 even if a reckless plaintiff is prepared to allege that the firm's report concerning a client's financial statements is an instance of "racketeering activity" under 18 U.S.C. § 1961(a). The issuance of the accountant's report is not itself "a violation of section 1962", which is the gravamen of the treble-damage action of 18 U.S.C. 1964(c). The report does not cause injury of the sort—takeover or destruction of an enterprise with the fruits of racketeering activity—which is the subject of the treble-damage remedy. "Congress has provided civil remedies for use when circumstances so warrant." *United States* v. *Turkette*, 452 U.S. 576, 585 (1981).

The *amicus curiae* believes that the decision below radically misconstrued the provisions and intent of the Racketeer Influenced and Corrupt Organization Act ("RICO") by applying its treble-damage remedy to the accounting firm petitioners and their reports. The *amicus curiae*, itself a defendant in RICO-based private damage actions, has a direct and vital interest that the scope of the treble-damage remedy of the RICO statute be determined by the Court.

REASONS FOR GRANTING THE WRIT

1. The conflicting decisions of courts of appeal and district courts cited by the court below and in the petition demonstrate the doubts which surround the construction of the RICO treble-damage remedy.

Accepting that the statute is not status-based and that affiliation with "organized crime" is not a prerequisite to its applicability does not mean, as the court below would have it, that there is "no legitimate principled criterion" (*Schacht* v. *Brown*, 711 F.2d 1343, 1356 (1983)) for delimiting the remedy. As shown above in connection with the interest of the *amicus curiae*, the issuance of an accountant's report neither violates § 1962, which is the gravamen of the § 1964(c) action, nor causes injury of the sort which the § 1964(c) remedy is intended to redress.

The scope of the RICO remedy is fairly in doubt. Its drastic nature is certain. It demands authoritative construction by the Court.

2. The effect of the decision below is to federalize the co mon law tort of deceit (as well as to render nugatory the remedies of the federal securities laws). The argument of the court below that such federalization has already been accomplished in the criminal field by the mail fraud statute itself (*Schacht*, *supra*, 711 F.2d at 1355) does not answer the question of whether Congress intended the RICO remedy to transfer common law fraud actions from the state courts to the civil dockets of the federal courts.

This effect upon the federal courts is compounded by the characterization and drastic nature of the remedy. No professional firm or legitimate business concern will accept without contest the allegation that its conduct is racketeering activity and that it is a racketeer influenced and corrupt organization. The "danger of vexatious litigation", *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975), is, so it may be

said, trebled by the RICO remedy. Unless and until the Court speaks, no defendant will fail to challenge by motion a RICO-based claim.

This impact upon the business of the federal courts particularly calls for the Court's consideration of the RICO remedy's scope.

3. That the question arises upon an appeal under 28 U.S.C. § 1292(b) from the denial of a motion to dismiss does not argue against the Court's review.

In addition to the precedents cited by petitioners (Pet., p. 10) is *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982). There, motions to dismiss (granted and denied in separate actions) had raised the question of the existence *vel non* of implied private damage remedies for violations of the Commodity Exchange Act.

In finding implicit congressional approval of such a remedy which had been fashioned by the courts, the Court left open questions as to the elements of liability, causation and damages (456 U.S. at 395). The Court's decision was followed by the enactment by Congress of express damage remedies in § 235 of the Commodity Futures Trading Act of 1982, 96 Stat. 2322, *codified at* 7 U.S.C. § 25 (Supp. 1983), which answered these open questions.

Here, too, the Court's construction of the RICO treble-damage remedy would provide the occasion for Congress to consider whether its intent had been accurately expressed in the statutory provisions it enacted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 1983